

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GARY GERLINGER, individually, on behalf of
all others similarly situated, and on behalf of the
California general public

Plaintiff,

v.

AMAZON.COM, INC.; BORDERS GROUP,
INC.; BORDERS, INC.; BORDERS ONLINE,
LLC; and BORDERS ONLINE, INC.,

Defendants.

No. C 02-05238 MHP

MEMORANDUM & ORDER
RE: PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS;
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Plaintiff challenges an agreement between Amazon.com, Inc. and Borders Online, LLC as violating federal and California antitrust laws, the California unfair competition law and the common law of unjust enrichment. Defendants have moved for summary judgment on all claims. Plaintiff moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) or in the alternative, for a continuance pursuant to Rule 56(f) to conduct further discovery. Having considered the submissions of the parties, and for the reasons set forth below, the court rules as follows.

BACKGROUND¹

Plaintiff is a consumer who purchases books online and who “purchased books directly from at least one of the [d]efendants.” FAC ¶ 10. Amazon.com Inc. (“Amazon”) is a market leader in the online retail book market. Amazon has invested hundreds of millions of dollars in technology and the content design of its website, Amazon.com. Declaration of Steven Kessel (“Kessel Decl.”) at ¶ 6. In addition to selling products to consumers, Amazon.com generates revenue by providing technology and business

1 services to other retailers. Declaration of Daniel Cooper in Support of Defendants' Motion for Summary
2 Judgment ("Cooper Decl.")² at ¶ 3. Beyond selling its own products on its website, Amazon.com operates
3 Amazon Marketplace where sellers of new and used books (among other products) offer their products for
4 sale on the Amazon.com website. When a visitor to the Amazon.com website searches for a book title,
5 they will be provided with both the Amazon.com offering for that title as well as any available Marketplace
6 seller's offering and prices for that title, even if the price is lower than that offered by Amazon.com. *Id.* at ¶
7 5. See also Declaration of Kyle Graham ("Graham Decl.") at ¶ 2 (copy of book Empire Falls available on
8 Amazon.com website through Amazon.com for \$14.46 and from Amazon Marketplace seller for \$11.37,
9 both including standard shipping).

10 Amazon.com also hosts auction sites on its website, where sellers offer products available for
11 consumers to bid on. Merchants can also establish their own "storefronts" through Amazon.com's zShops,
12 which enables sellers to offer their merchandise for sale at the prices they choose. Thus, a given product on
13 Amazon.com's website may be listed for sale simultaneously by Amazon.com as well as several different
14 Marketplace, zShops, and auction sellers. Cooper Decl. at ¶ 6.

15 Amazon.com has also entered into collaborations with other retailers. These collaborations take
16 many different forms. For example, Amazon.com and Toys 'R' Us agreed to launch a toy and video game
17 store on the Amazon.com website. In that arrangement, Toys 'R' Us supplies the inventory and
18 Amazon.com provides the hosting, order fulfillment and customer relations services. Cooper Decl. at ¶ 7.
19 For Target Stores, Amazon.com operates Target's website selling Target's products under the Target
20 brand name.

21 Amazon.com also has arrangements with a number of partners who wish to maintain a presence on
22 the web but do not wish to incur the cost involved in selling products through the Internet. In these
23 arrangements ("Syndicated Stores") Amazon.com uses the partner's website, (which site retains the
24 partner's name and URL) but Amazon.com sells its own products and is responsible for filling orders and
25 for customer service. Amazon.com's partners in these arrangements earn commissions on the products
26 sold through the site. Amazon.com has a "Syndicated Store" arrangement with Borders as well as with
27 partners such as Virgin Mega stores and Waterstones in the United Kingdom. *Id.* at ¶ 8.
28

1 Defendant Borders, Inc. is a wholly-owned subsidiary of defendant Borders Group, Inc.
2 Defendant Borders, Inc. (collectively “Borders”) operates and manages more than 400 brick-and-mortar
3 stores. Declaration of Edward Wilhelm (“Wilhelm Decl.”) at ¶ 2. Borders touts itself as the nation’s second
4 largest operator of retail book “superstores.” Borders did not launch a website until 1998 and even then
5 did so with some reservations based on its lack of experience as an Internet retailer and the fact that at that
6 point the ability to earn an acceptable return on investment in the Internet arena was uncertain. *Id.* at ¶ 5.
7 Borders did not make a large capital investment in its website. *Id.* at ¶ 7. Borders instead invested in
8 expansion and improvement of its brick-and-mortar stores. *Id.* at ¶ 8.

9 Between 1998 and 2000, Borders.com sales accounted for less than 1% of Borders’ total
10 consolidated sales. Sales on the Borders.com website account for less than one-tenth of one percent of
11 industry-wide book sales (i.e., both online and brick-and-mortar stores book sales). Kessel Decl. at ¶ 14;
12 Graham Decl., Exh. L at 2 and Exh. M.³

13 Although sales on Borders.com increased, so did its losses. Wilhelm Decl. at ¶ 9 (In fiscal year
14 1999, Borders.com generated sales of \$17.9 million and losses of \$17.2 million but in fiscal year 2000,
15 Borders.com lost \$29.7 million on sales of \$27.4 million). Because of these losses, in 2000 Borders
16 considered various options in regards to its website such as shutting it down, spinning it off as a public
17 company or outsourcing the web site to a third party.⁴ In November of 2000, Borders began discussions
18 with Amazon.com about a co-branded website. *Id.* at ¶¶ 10-12. At this time Amazon.com was actively
19 pursuing its strategy of providing technology and business services to other retailers and believed that
20 entering a venture with Borders would “further validate its model of providing services to brick-and-mortar
21 retailers.” Cooper Decl. at ¶ 11. Moreover, the Agreement with Borders helped Amazon.com achieve
22 additional economies of scale, thus reducing Amazon’s costs. *Id.* At ¶ 11; Kessel Decl. ¶ 18.

23 In April 2001, Amazon and Borders executed a “Syndicated Store” agreement (the “Agreement”
24 or “Mirror Site Hosting Agreement”) under which they would jointly relaunch www.borders.com as a co-
25 branded website.⁵ The Agreement provides that www.borders.com will be operated by Amazon and that
26 Amazon will provide the inventory fulfillment, customer services, and site content for the new co-branded
27 website. Under the Agreement, Amazon.com unilaterally determines the selection of products offered, the
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1 terms of sale and the prices for the books sold on the web site **except for those books available for in-**
2 **store pickup** at a Borders brick-and-mortar store. Borders sets the price for books to be purchased online
3 but picked up in its stores. Wilhelm Decl. at ¶ 13.

4 Amazon is the actual seller of the books sold on the website and accordingly retains proceeds for
5 those sales. Borders paid Amazon.com a one-time fee for creating the website and Borders receives a
6 commission on each sale. Defendants assert that the Agreement is a service agreement. Amazon must
7 achieve certain service levels or risk being in breach of the Agreement which would enable Borders to
8 terminate the Agreement prior to the expiration of the Agreement term (originally two years, then extended an
9 additional three years). Borders alleges that its objectives in entering into the Agreement were to “maintain a
10 retail presence on the Internet, preserve a connection from the Internet back to [their] stores, reduce [their]
11 losses and improve [their] financial returns.” Wilhelm Decl. at ¶ 12. The Agreement has no impact on the
12 legal ownership of the www.borders.com URL which continues to be held by Borders. In April 2002, the
13 parties extended the Agreement to include the www.waldenbooks.com site as well. Cooper Decl. ¶ 16

14 Plaintiff generally alleges that the Agreement eliminates competition between two former rivals in the
15 market for online sales of books and that consumers are therefore denied a competitive choice for their online
16 book purchases. As discussed in detail below, plaintiff claims that two provisions of the Agreement are *per*
17 *se* violations of the antitrust laws.

18 Earlier in 2003 Defendants brought a motion to dismiss several counts of plaintiff’s complaint. At the
19 hearing on April 7, 2003 this court denied defendant’s motion to dismiss without prejudice for renewal of it
20 on a motion for summary judgment. See Hearing Transcript attached as Exh. A to the Declaration of Roy
21 Katriel in support of Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment (“Katriel Decl.”)

22 Defendants have now filed a motion for summary judgment and plaintiff has filed a Motion for
23 Judgment on the Pleadings as to liability on counts II, IV, V, VI, and VII of the First Amended Complaint.

24 25 LEGAL STANDARD

26 A. Motion for Judgment on the Pleadings

27 After all parties have submitted their pleadings, any party may invoke Federal Rule of Civil Procedure
28 12(c) and move for judgment on the pleadings as long as consideration of the motion does not delay trial.

1 Fed. R. Civ. P. 12(c). “Judgment on the pleadings is proper when the moving party clearly establishes on the
2 face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as
3 a matter of law.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1989).
4 The court accepts all allegations of the nonmoving party as true. Doleman v. Meiji Mut. Life Ins. Co., 727
5 F.2d 1480, 1482 (9th Cir. 1984). If the court reviews matters outside the pleadings, the motion is properly
6 treated as a motion for summary judgment. Fed. R. Civ. P. 12 (c). In deciding such a motion, the court may
7 also consider facts that are properly the subject of judicial notice. Cf. MGIC Indem. Corp. v. Weisman, 803
8 F.2d 500, 504 (9th Cir. 1986). Interpretation of a contract is a purely legal question which is susceptible to a
9 motion for judgment on the pleadings. Cf. Atel Financial Corp. v. Quaker Coal Co., 321 F.3d 924, 925-26
10 (9th Cir. 2003)(interpretation of a contract is a pure question of law).

11 Defendants assert that plaintiff has not met the legal standard for judgment on the pleadings. A
12 plaintiff is not entitled to judgment on the pleadings if the defendant’s answer raises issues of fact or an
13 affirmative defense, which, if proved, would defeat plaintiff’s recovery. Qwest Communications Corp. v.
14 City of Berkeley, 208 F.R.D. 288, 291 (N.D. Cal. 2002)(plaintiff’s motion on the pleadings can be granted
15 only if all affirmative defenses raised in answer are legally insufficient). Both Borders and Amazon.com in
16 their answers to the FAC, raised the affirmative defenses that plaintiff lacked standing and that he had
17 suffered no antitrust injury. Plaintiff has not countered these defenses in his motion.

18 In order to determine whether the plaintiff has “antitrust standing” the court must evaluate the
19 plaintiff’s harm, the alleged wrongdoing by the defendants and the relationship between them. Associated
20 Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 5353 (1983);
21 Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987 (9th Cir. 2000). As discussed below, plaintiff
22 has made no showing that the alleged price-fixing, if analyzed pursuant to the rule of reason would in fact be
23 detrimental to plaintiffs. On first blush it appears that section 4.3 of the Agreement would lead to lower
24 prices available to consumers on the Borders.com website. Plaintiff has adduced no evidence that, but for
25 Section 4.3 Amazon would have lowered its prices but did not do so because it would have been obligated to
26 list the lower prices on both the Borders.com website and the Amazon.com website. In contrast,
27 Amazon.com has introduced evidence that despite Section 4.3 of the Agreement, Amazon.com has lowered
28 prices five times since July 2001. Kessel Decl. at ¶ 5; Zapolsky Decl. Exh. T.

1 Nor has plaintiff demonstrated that he has suffered an “antitrust injury.” Injury that flows from aspects
2 of a defendant's conduct that are beneficial or neutral to competition is not "antitrust injury." MetroNet Servs.
3 v. U.S. West, 325 F.3d 1086 (9th Cir.2003); Rebel Oil, 51 F.3d at 1433. Where the defendant's conduct
4 harms the plaintiff without adversely affecting competition generally, there is no antitrust injury. MetroNet
5 Servs, 325 F.3d 1086; Pool Water Prods. v.Olin Corp., 258 F.3d 1024, 1034-36 (9th Cir.2001).

6 The court questions plaintiff's standing and whether plaintiff has suffered an “antitrust injury.”
7 Nonetheless, the court will analyze the claims presented.

8 B. Motion for Summary Judgment

9 Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who
10 fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on
11 which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an
12 essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp.
13 v. Catrett, 477 U.S. 317, 322-23 (1986); see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809
14 F.2d 626, 630 (9th Cir. 1987).

15 The moving party bears the initial burden of identifying those portions of the record which
16 demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to
17 “go beyond the pleadings, and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, or
18 admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Celotex, 477 U.S.
19 at 324 (citations omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)(a dispute
20 about a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the
21 nonmoving party”). The moving party discharges its burden by showing that the nonmoving party has not
22 disclosed the existence of any “significant probative evidence tending to support the complaint.” First Nat’l
23 Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1968).

24 The court’s function on a motion for summary judgment is not to make credibility determinations. See
25 Anderson, 477 U.S. at 249. The inferences to be drawn from the facts must be viewed in a light most
26 favorable to the party opposing the motion. See T.W. Elec. Serv., 809 F.2d at 631.

27 In an antitrust case, “if the factual context renders [plaintiff’s] claim implausible- if the claim is one that
28 simply makes no economic sense - [plaintiff] must come forward with more persuasive evidence to support

1 [his] claim than would otherwise be necessary.” Matushita Electric Industrial Co., Ltd. v. Zenith Radio
2 Corp., 475 U.S. 574, 587 (1986). The idea that Amazon and Borders are trying to maintain some artificially
3 high price structure to the detriment of consumers is fairly ludicrous on its face as both the Amazon and
4 Borders websites list numerous third party sellers of the same books Amazon and Borders are offering
5 without any attempt to regulate the prices offered by these third parties and with the effect that these parties
6 frequently offer lower prices than those of offered by Amazon. See Graham Decl. and related exhibits.

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10 C. Motion for a Continuance Under Federal Rule of Civil Procedure 56(f)

11 Pursuant to Federal Rule of Civil Procedure 56(f), upon a showing by the party opposing a motion
12 for summary judgment that it "cannot for reasons stated present by affidavit facts essential to justify the party's
13 opposition," the court may deny or continue the motion for summary judgment in order to permit that party an
14 opportunity to obtain necessary discovery. "Ordinarily, summary judgment should not be granted when there
15 are relevant facts remaining to be discovered, but the party seeking a continuance bears the burden to show
16 what specific facts it hopes to discover that will raise an issue of material fact." Continental Maritime v.
17 Pacific Coast Metal Trades, 817 F.2d 1391, 1395 (9th Cir. 1987).

18
19 A Rule 56(f) motion should be granted where the party opposing summary judgment makes a timely
20 application that specifically identifies relevant information to be discovered, and there is some basis for
21 believing that such information actually exists. Visa Int'l Serv. Ass'n v. Bankcard Holders, 784 F.2d 1472,
22 1475 (9th Cir. 1986). Granting of such a motion is particularly appropriate where the identified information is
23 the subject of outstanding discovery requests. Id.

24
25 DISCUSSION

26 I. The Antitrust Claims: Alleged Per Se Violations

27 Plaintiff's motion for judgment on the pleadings hinges primarily on interpretation of two provisions of
28 the Agreement: one regarding prices and the other provision which limits Borders from engaging in other

1 online retailing pursuits during the time of the Mirror Site Hosting Agreement. Plaintiff asserts that both of
2 these provisions independently constitute *per se* violations of 15 United States Code, section 1 ("the Sherman
3 Act"). The court will address each of these arguments in turn.

4 A. Allegations of *Per Se* Price Fixing

5 Section 1 of the Sherman Act forbids contracts, combinations, or conspiracies in restraint of trade,
6 including price-fixing agreements between competitors. See 15 U.S.C. § 1. The Mirror Site Hosting
7 Agreement is without question, an "agreement." The question is whether the Agreement is "unreasonable"
8 under section 1. Am. Ad.Mgmt., 92 F.3d at 788. See also N'west Wholesale Stationers, Inc. v. Pac.
9 Stationery and Printing Co., 472 U.S. 284, 289 (1985). To determine whether the agreement is
10 unreasonable, the court must decide at the threshold whether it is *per se* illegal or whether it must be analyzed
11 under the "rule of reason." Paladin Assoc., Inc. v. Montana Power Co., 328 F.3d 1145, 1155 (9th Cir.
12 2003).

13 Treating an agreement as *per se* illegal is appropriate only if the agreement falls within the category of
14 "agreements or practices which because of their pernicious effect on competition and lack of any redeeming
15 virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the
16 precise harm they have caused or the business excuse for their use." N'west Wholesale Stationers, 472 U.S.
17 at 289, 105 S.Ct. 2613. The decision to apply the *per se* rule turns on "whether the practice facially appears
18 to be one that would always or almost always tend to restrict competition and decrease output." Id. at 289-
19 90, 105 S.Ct. 2613. See also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S.
20 85, 103-04, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984)("*Per se* rules are invoked when surrounding
21 circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further
22 examination of the challenged conduct.").

23 Price fixing occurs when two competitors jointly set prices for their respective goods. Broadcast
24 Music, Inc. v. Columba Broadcasting Sys., Inc., 441 U.S. 1, 9 (1979). Impermissible price-fixing
25 arrangements are not limited to agreements to charge uniform or identical prices. See e.g., United States v.
26 Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940)(combination with the purpose and effect of raising,
27 depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal
28 *per se*); Local 36 of Intern. Fisherman & Allied Workers of Am. v. United States, 177 F.2d 320, 337 (9th

1 Cir. 1949) (same); In re Wheat Rail Freight Antitrust Litig., 579 F.Supp. 517, 538 (N.D. Ill. 1984), aff'd
2 759 F.2d 1305 (7th Cir. 1985)(agreement which sets manner in which rates/prices are calculated illegal price
3 fixing).

4 Plaintiff alleges that the Agreement contains a “price fixing arrangement,” which arrangement, he
5 alleges, is a *per se* violation of Section 1 of the Sherman Act. The provision in question, Section 4.3 of the
6 Agreement provides that:

7 As between the Parties, Amazon.com or its Affiliates will determine the prices and other fees
8 and terms and conditions (including without limitation, shipping and handling) for all Products
9 offered for sale through the Mirror Site and the Amazon.com Site; provided, that process,
10 other fees, and terms and conditions for sale of the Mirror Products through the Mirror Site
will be at least as favorable as the prices offered for each of the same Mirror Products sold
through the Amazon.com site (other than any applicable taxes required or chosen to be
collected through the Mirror Site).

11 Wilhelm Decl., Exh. B, at p.8 (Agreement § 4.3 (emphasis added)).

12 The parties agree that this section of the Agreement forbids Amazon from selling a book on its own
13 site at a price lower than the price for which Amazon offers the book for sale at the www.Borders.com site.
14 Beyond this, the parties hotly contest the effect of this section. Plaintiff interprets this language as a horizontal
15 price-fixing term that is *per se* unlawful. Neither party has cited to the court a case with a similar type of
16 arrangement.⁶ While book-selling, including online book-selling is not a new industry, the court is required in
17 this case to determine whether the *per se* analysis should apply to a new method of marketing.

18 The court concurs that section 4.3 of the Agreement concerns prices. However, the court rejects
19 plaintiff’s suggestion that because the provision of the Agreement may have an affect on prices, that it is
20 automatically a *per se* illegal “price-fixing agreement.” The court is not persuaded by plaintiff’s citations on
21 this point to Catalano, Inc. v. Target Stores, Inc., 446 U.S. 643 (1980); United States v. Masonite Corp.,
22 316 U.S. 2655 (1942); and General Cinema Corp. v. Buena Vista Distribution Co., Inc., 532 F. Supp. 1244
23 (C.D. Cal. 1982). Although in each of these cases *per se* price-fixing was found, none of the agreements is
24 sufficiently similar to the Mirror Site Hosting Agreement to be persuasive. In Catalano competing wholesalers
25 conspired to fix credit terms offered to customers. See Catalano, 446 U.S. at 644-45. In Masonite, the
26 relevant contracts provided for specific minimum prices. See Masonite, 316 U.S. at 271. In General
27

1 Cinema, the parties arranged to “split” rights of first negotiation for new films. See General Cinema, 532
2 F.Supp. at 1256-57.

3 As the Supreme Court stated in BMI, “not all arrangements among actual or potential competitors
4 that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints.” BMI,
5 441 U.S. at 23. In order for the court to apply the *per se* rule plaintiff must convince the court that
6 Amazon’s agreement not to undercut the prices it offers on behalf of its partner “threatens the ‘central
7 nervous system of the economy,’ that is, competitive pricing.” BMI, 441 U.S. at 23, quoting United States v.
8 Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

9 Plaintiff takes many different runs at trying to explain how this section amounts to price-fixing.
10 Defendant and Plaintiff concur that a company can unilaterally set the price of its own products. However,
11 plaintiff rejects the premise that Amazon.com can in fact make pricing decisions unilaterally for the books
12 offered on the two sites. Plaintiff claims that Section 4.3 of the Agreement “limits the parties’ discretion to
13 price products on the two sites.” Pl. Opp. To Def’s Motion for Summary Judgment at 4:21-23.⁷ Plaintiff
14 argues that Amazon’s discretion in setting prices would end were Amazon to use that discretion to set a more
15 advantageous price for a book on its own website than it were to set on the www.Borders.com site. Plaintiff
16 takes this argument one step further alleging that the Agreement is “a binding assurance that Amazon.com will
17 not price the books it sells on the www.Amazon.com website below a certain threshold.” Plaintiff’s Reply
18 Brief in Support of Motion for Judgment on the Pleadings at 3:11-14. The court finds this last interpretation
19 to be a blatant misconstruction of Section 4.3. The court finds that nothing in the Agreement would ban
20 Amazon.com from selling each and every book on its website for \$1 as long as the same price were listed on
21 the Borders.com website.

22 Defendant counters that since all the books belong to Amazon, Amazon is only setting prices for its
23 own product. Defendants cite the BMI case in defense of their Agreement. While the case at bar does have
24 certain similarities to the BMI case the facts of the BMI case are not sufficiently similar to the current case to
25 provide this court with an easy answer. In BMI, the Supreme Court focused on the question of whether the
26 fees BMI and ASCAP set for blanket licensing agreements of individual copyright owners’ works constituted
27 *per se* unlawful price-fixing. The Supreme Court upheld the blanket licensing fee based on the Court’s
28 finding that:

1 [T]he blanket-license fee is not set by competition among individual copyright owners, and it
2 is a fee for the use of any of the compositions covered by the license. But the blanket license
3 cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP
4 does set the price for its blanket license, but that license is quite different from anything any
5 individual owner could issue. The individual composers and authors have neither agreed not
6 to sell individually in any other market nor use the blanket license to mask price fixing in such
7 other markets. Moreover, the substantial restraints placed on ASCAP and its members by
8 the consent decree must not be ignored.
9 BMI at 23-24.

10 The Agreement between Amazon and Borders is substantially different from the agreement between
11 ASCAP and BMI and the composers; the service offered by the blanket license fee was both unique to the
12 music industry and had been tested many times over in prior litigation. Thus, the Supreme Court's holding in
13 BMI does not mandate a particular conclusion regarding the Mirror Site Hosting Agreement.

14 Plaintiff avers that the Agreement constitutes horizontal price-fixing since it "gives Borders the right to
15 control the minimum price at which books will be sold, even when those books do not belong to Borders."
16 Id. at 7:13-15. Plaintiff looks to Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982), for
17 support that an agreement which sets an outside price range is a "naked restraint" on trade.

18 In Maricopa County, a group of Arizona doctors agreed through their affiliation in a medical
19 foundation to adhere to a fee schedule establishing a maximum payment that any participating physician could
20 collect from his or her patients who had medical insurance. Nothing prevented the physicians from charging
21 less than the maximum, but they could never charge more than the agreed upon upper limit. The Supreme
22 Court disallowed the agreement, finding it *per se* price-fixing. Id. at 357.⁸

23 The court does not find that the Agreement at issue here contains the same constrictions as the
24 agreement in Maricopa County. Read literally, the Agreement does not mandate a minimum price as plaintiff
25 suggests. Conceivably under the Agreement Amazon could sell a book at a lower price on the Borders.com
26 website than the price it would list the same book for on its own Amazon.com site. Although there would be
27 no apparent business reason for doing so, this is still a relevant consideration in determining whether the
28 provision "fixes" prices. The court finds that the Agreement does not set a minimum, maximum or range for
the prices Amazon.com can charge for the books it sells on the web sites. The court concurs with Amazon
that it has unfettered discretion to choose a price at which a book will be sold.

The court further finds that the Agreement in any no way affects the prices that Borders can sell
books for at its brick-and-mortar stores or the price that Borders sets for books to be purchased on the

1 Borders.com website for books which will be picked up at the store; nor does the Agreement affect the price
2 Borders can list the book for on its own Bordersstores.com site to be reserved and purchased in the store.
3 Thus the court finds that § 4.3 does not constitute *per se* price-fixing.
4

5 B. Allegations that Section 4.3 is at Most an Ancillary Restraint

6 Defendants propound the same argument both to defend against plaintiff's motion for judgment on the
7 pleadings and in seeking summary judgment on their favor on the Section 1 claim – i.e., that the Agreement is
8 procompetitive and thus permissible under a rule of reason analysis.

9 Defendants assert that “even if Section 4.3 could be characterized as affecting prices, it would still not
10 merit *per se* condemnation because it is an ancillary provision within a procompetitive agreement between
11 Amazon.com and Borders. Section 4.3, defendants argue, is a small part of an arrangement under which
12 Amazon.com agrees to operate and maintain the Mirror Site. An agreement will be reviewed under the rule
13 of reason where the agreement on price is ancillary to the overall agreement. Polk Bros., Inc. v. Forest City
14 Enterprises, Inc., 776 F.2d 185, 188-89 (7th Cir. 1985)(if at the time ancillary restraint was adopted it may
15 promote the success of a more extensive cooperation, then the rule of reason is applied). In Polk Brothers,
16 two retailers agreed to share space to provide customers with a full line of home supplies. Polk Bros. sold
17 appliances, Forest Enterprises sold building materials. As part of their agreement, the parties negotiated a
18 fifty year restrictive covenant specifying products that each retailer could and could not sell. Id. at 187. The
19 trial court found this arrangement to be a *per se* violation of the antitrust laws, but the Court of Appeal
20 reversed holding that the horizontal restriction was ancillary to the agreement and therefore subject to the rule
21 of reason. Id. at 188. The restriction, the court found, was intended to prevent one party “free-riding” off the
22 other. Id. at 190.

23 Defendants argue that the same analysis applies here. Were Amazon.com able to offer lower prices
24 for books on its own website than it did on Borders.com, then shoppers originally lured to the Borders.com
25 site by the Borders name (its contribution to the Agreement) could be induced to purchase the book at a
26 lower price from Amazon.com thus cheating Borders out of its commission. As in Polk Bros, section 4.3 of
27 the Agreement prevents Amazon.com from free-riding off of Borders. See also Paladin Assoc., Inc. v.
28 Montana Power Co., 328 F.3d 1145, 1155 (9th Cir. 2003) and Rothery Storage and Van Co. v. Atlas Van

1 Lines, Inc. 792 F.2d 210, 229 (D.C. Cir. 1986). As the Polk Bros case makes clear, the court may look
2 beyond the language of the agreement to the context in which the agreement was entered to determine
3 whether the provision is ancillary. Polk Bros, 776 F.2 at 189. Looking beyond merely the language of the
4 Mirror Site Hosting Agreement to the conduct of the parties and the context in which the agreement was
5 entered into, the court concurs that § 4.3 is an ancillary provision.

6 Once the court has determined that the provision is ancillary, then the rule of reason applies. The rule
7 of reason weighs legitimate justifications for a restraint against any anticompetitive effects. In a rule of reason
8 analysis, the court must review all the facts, including the precise harms alleged to the competitive markets,
9 and the legitimate justifications provided for the challenged practice, and determine whether the
10 anticompetitive aspects of the challenged practice outweigh its procompetitive effects. See N'west Wholesale
11 Stationers, 472 U.S. at 290-93; see also Cal. Dental Ass'n v. FTC, 224 F.3d 942, 947 (9th Cir.2000) (on
12 remand from the Supreme Court). Amazon.com's agreement with Borders regarding pricing on the two
13 websites is anticompetitive if it "[harms] allocative efficiency and raises the prices of goods above competitive
14 levels or diminishes their quality" Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir.1995).
15 Currently, the court does not have before it sufficient evidence to make a determination on the issue of
16 whether the Agreement has an anti-competitive effect.

17 C. Allegations of an Impermissible Horizontal Market Allocation

18 In the FAC, plaintiff alleges that the provision of the Agreement which limits Border's online activity is
19 a horizontal market division and *per se* illegal. FAC ¶¶ 46-57; 65-72. Interestingly, plaintiff does not raise
20 this issue at all in his motion for judgment on the pleadings, but defendants raise the issue in their motion for
21 summary judgment.

22 Amazon.com is the seller of record and inventory supplier of any books sold online either through
23 the www.Amazon.com or the www.Borders.com website. See Agreement §§ 4.2.1 and 4.3. Section 6.1
24 of the Agreement prohibits Borders from selling any book online directly or through an affiliation with another
25 party. Section 6.1 provides in pertinent part:

26 Commencing on the Launch Date and thereafter during the Term, Borders.com will not, and
27 will cause its Affiliates not to, (a) operate, endorse, link to from the Borders.com Hosted
28 Sites, or promote the e-commerce functionality of any web-based or online service that
permits Persons not located in a Borders Physical Outlet to purchase products for shipment
to a destination not located in a Borders Physical Outlet (e.g. Yahoo! Shopping,

Shop@AOL, or barnesandnoble.com); (b) **sell or distribute products for compensation** through any web-based or online service that in either case permits Persons not located in a Borders Physical Outlet to purchase products (e.g. Yahoo! Shopping, Shop@AOL, or barnesandnoble.com).

Agreement § 6.1. (Emphasis added).

Thus, plaintiff asserts, the parties have allocated the online bookselling market venue solely to Amazon.com, leaving Borders to sell books only in the brick-and- mortar venue. Plaintiff claims that as a result of the Agreement two competitors have agreed to divide up a “market” and that this is *per se* impermissible. Palmer v. BRG of Georgia, 498 U.S. 46 (1990)(per curiam); United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991)

Defendants propose several analyses as to why this provision is not illegal. Defendants assert that the Agreement does not restrict any other sales activity of Borders such as off-line sales of books, use of the Bordersstores.com website for shoppers to reserve books for in-store pick up or Amazon.com’s right to build brick-and- mortar stores if it chose. Defendants also argue that the Agreement involves “only an ancillary restraint in the context of an integrative venture with procompetitive goals and effects” and should thus be judged according to the “rule of reason.” Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F.2d 185, 188-89 (7th Cir. 1985).

Plaintiff asserts that the holding of Palmer v. BRG of Georgia, 498 U.S. 46 (1990)(per curiam) compels a finding of illegal *per se* market allocation. Plaintiffs in Palmer were purchasers of Georgia Bar review courses. Prior to entering into an agreement, defendants BRG and HBJ were competitors each offering bar review courses in Georgia. The Palmer defendants entered into an agreement whereby HBJ agreed to turn its Georgia bar review operations over to BRG and to grant BRG an exclusive license to market bar review courses under HBJ’s “BarBri” trade name. Id. at 47. The Palmer plaintiffs moved for partial summary judgment. The Supreme Court reversed denials of summary judgment by both the trial and appeals court, and found the agreement *per se* unlawful. The Court held that:

Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other’s territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. Thus, the 1980 agreement between HBJ and BRG was unlawful on its face
Id. at 49-50.

1 Plaintiff argues that the same rationale applies here because under the Agreement Borders exited the
2 “online book sales **market segment** and allocate[d] that market segment Amazon.com only.” Pl. Opp. at
3 10:24-11:2. (emphasis added) Before the court can determine whether section 6.1 constitutes an agreement
4 to split a market, the court must determine what the relevant market is. In the Palmer case, the question was
5 very straightforward, the market was the State of Georgia. Here the question is not so clear. No conclusive
6 evidence has been adduced either by plaintiff or by defendants regarding the appropriate market definition.
7 Amazon.com refers to a survey it conducted to support its allegation that consumers who purchase books
8 online will also be just as likely if not more so to purchase books in a bricks-and-mortar book store and thus
9 the “market” is books sold in all venues. See Kessel Decl. at ¶¶ 15-16.⁹ (Amazon.com commissioned study
10 by Lewis Mobilio which showed that Amazon.com customers purchased books both online and in brick-and-
11 mortar stores). If this is correct, then the court would find no clear *per se* market allocation. Plaintiff
12 contests the admissibility of this evidence yet offers nothing but unsupported allegations that there is a
13 separate and distinct “online market segment.” Without such evidence the court is precluded from finding a
14 *per se* violation such as that found in Palmer.

15 Defendant asserts that this provision is at most an ancillary restraint which prevents “free-riding” by
16 Borders. Defendants also claim that the exclusivity provision is “narrowly limited to the specific area in which
17 Amazon.com and Borders agreed to collaborate -- online sales of books for direct home delivery.” Defs’
18 Reply at 10:1-3, citing to Rothery Storage. The court finds this last contention troubling. If the provision is in
19 fact intended to prevent free-riding -- i.e. allowing Borders to dilute its name recognition in the on-line
20 market, then the provision goes beyond the “narrow tailoring” defendant asserts. Under section 6.1 during
21 the term of the agreement Borders could not even provide overstock books to another online marketer even
22 if there were no mention online that these books came from Borders. The court has insufficient evidence on
23 this issue to make a determination at this time. Therefore, Defendants’ Motion for Summary Judgement on
24 this issue is denied.

25
26 II. Claims Regarding an Alleged Conspiracy to Monopolize

27 Count IV of the FAC alleges that defendants entered into a conspiracy to monopolize the market in
28 violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The elements of this claim are : (1) a combination,

1 conspiracy, or agreement; (2) specific intent to monopolize; and (3) an overt act to further the conspiracy.
2 Paladin Assoc., Inc. v. Montana Power Co., 328 F.3d 1145, 1155 (9th Cir. 2003), citing United States v.
3 Yellow Cab Co., 332 US 218, 224-25 (1947).

4 The existence of an agreement is not in dispute. As noted above, proof of a conspiracy requires
5 proof of a specific intent to monopolize. Plaintiff's sole evidence of intent is his alleged "proof of an
6 underlying violation of Section 1 of the Sherman Act." Pl. Motion at 13:20-22. Because the court has
7 rejected plaintiff's arguments regarding *per se* violations and has not conclusively determined any Section 1
8 violation, plaintiff has not, at this stage of the proceedings, proven intent. Therefore, plaintiff's motion for
9 judgment on the pleadings on this cause of action is denied.

10
11 III. Alleged Clayton Act Violations

12 Each party argues that the court should rule in its favor on Count V of the FAC – the Clayton Act
13 Claim. Count V of the FAC alleges that defendants have violated Section 7 of the Clayton Act, 15 U.S.C. §
14 18. ("Section 7"). See FAC ¶¶ 79-82. The language of Section 7 makes it unlawful for a firm to "acquire"
15 the equities or assets of another firm where the necessary anti-competitive effects occur but it says nothing
16 about liability for the seller. As a result, "a [S]ection 7 claim for monetary damages, as a matter of law, does
17 not exist against the person or entity selling the assets but rather must be brought against the acquiring person
18 or entity." Arbitron Co. v. Tropicana Prod. Sales, 1993 WL 138965, at *4 (S.D.N.Y. Apr. 28, 1993); see
19 also United States v. Coca-Cola Bottling Co., 575 F.2d 222, 230 (9th Cir. 1978) (stating that sellers in
20 Section 7 cases are not technically violators of the law); Fricke-Parks Press, Inc. v. Fang, 149 F. Supp. 2d
21 1175, 1185 (N.D. Cal. 2001) (stating that Section 7 does not cover claims against sellers for damages); Tim
22 W. Koerner & Assocs., Inc. v. Aspen Labs., Inc., 492 F. Supp. 294, 300 (S.D. Tex. 1980), aff'd, 683 F.2d
23 416 (5th Cir. 1982) (holding that "by its express terms, [S]ection 7 of the Clayton Act is directed only against
24 the acquiring corporation."). As a result, there can be no claim as a matter of law against Borders as there is
25 no indication that Borders acquired an asset pursuant to the Agreement. The court will however, review the
26 claim as it stands against defendant Amazon.com.

27 Section 7 of the Clayton Act is the principal antitrust statute applicable to mergers and acquisitions. It
28 provides in relevant part as follows:

No person engaged in commerce or in any activity affecting commerce shall *acquire*, directly or indirectly, the whole or any part of the *stock or other share capital* and no person subject to the jurisdiction of the Federal Trade Commission shall *acquire the whole or any part of the assets of another person* engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (emphasis added). For those subject to the jurisdiction of the Federal Trade Commission, the following transactions are within the reach of the statute: (1) both of the participants – the acquiring firm and the acquired firm – must be engaged either in interstate or foreign commerce or an activity affecting such commerce; (2) the challenged transaction must constitute an “acquisition” within the meaning of Section 7; (3) the acquisition must be of “stock” or “assets”; (4) the acquisition may be indirect as well as direct; and (5) the acquisition may be of all or any part of the stock or assets of the acquired person. 2 Julian O. von Kalinowski et al., Antitrust Laws and Trade Regulation, § 29.02 [1][c] (2d ed. 2003).

A. The Acquisition Issue

Previously, defendants brought a Motion to Dismiss, claiming that plaintiff had failed to allege any facts or allegations that the Agreement constituted a merger or its functional equivalent within the purview of Section 7 and alleging that the Agreement between Amazon.com and Borders constitutes an “acquisition” of “asset(s)” within the meaning of Section 7.

The words “acquire” and “acquisition” are not defined in Section 7 or elsewhere in the Clayton Act. In keeping with the broad mandate of antitrust laws, however, courts have generally adopted a flexible approach in determining the scope of this language. Addamax Corp. v. Open Software Found. Inc., 888 F. Supp. 274, 285 (D. Mass. 1995) (citing United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 337-339 (1963)); see also United States v. Columbia Pictures Corp., 189 F. Supp. 153, 181-82 (S.D.N.Y. 1960) (holding that the words “acquire” and “assets” are generic terms, which are to be given liberal interpretation by the courts).

The term “asset,” as used in Section 7, has been broadly interpreted. It has been construed to include, among other things, patents, SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1205 (2d Cir. 1981), cert denied, 455 U.S. 1016 (1982); trademarks, United States v. Beatrice Foods Co., 344 F. Supp. 104, 114 (D. Minn. 1972), aff’d on other grounds, 493 F.2d 1259 (8th Cir. 1974), cert. denied, 420 U.S. 961

(1975); and even sales routes and sales volumes, United States v. ITT-Continental Baking Co., 485 F.2d 16, 20 (10th Cir. 1973), rev'd on other grounds, 420 U.S. 223 (1975).

At the April 7, 2002 hearing on defendants' Motion to Dismiss, this court ruled that plaintiff's allegations on the Section 7 claim were sufficient to put defendants on notice as to the nature of his claims. See Katriel Decl., Exh A (April 7, 2003 Hearing Transcript at 22:9-23:5). The court did not, however, preclude defendants from raising this argument again as part of a motion for summary judgment. Defendants have, in fact, now made a claim for summary judgment on the Section 7 claim, and plaintiff has moved for judgment on the pleadings on this claim as well.

Plaintiff makes two arguments as to how the Agreement constitutes an "acquisition of assets" within the meaning of Section 7. First, plaintiff argues that in defendants' answer to the FAC, defendants "concede that, pursuant to their transaction, Borders granted Amazon.com the legal right to redirect users of the www.Borders.com website to Amazon.com's www.Amazon.com website." Pl. Mot. At 17:10-14 citing to Defendants' Answers at ¶ 35. Plaintiff then asserts that this legal permission is equivalent to the grant of a license from Borders to Amazon.com for the use of Border's website and thus falls into the definition of an acquisition as set out in United States v. Columbia Pictures Corp., 189 F.Supp.153, 181-82 (S.D.N.Y. 1960)(Section 7 imposes no specific method of acquisition, rather with the end result of a transfer of a sufficient part of the bundle of legal rights and privileges to give the transfer economic significance and a proscribed adverse effect.).

Many courts, including this one, have deferred to the ruling in Columbia Pictures, 189 F. Supp. 153, as guidance for the interpretation of Section 7. See Nelson v. Pacific Southwest Airlines, 399 F. Supp. 1025, 1028 (S.D. Cal. 1975); see also ITT-Continental Baking, 485 F.2d at 20; Mr. Frank, Inc. v. Waste Mgmt, Inc., 591 F. Supp. 859, 866 (N.D. Ill. 1984); Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362, 374 (N.D. Ga. 1975), aff'd, 535 F.2d 313, reh'g denied, 540 F.2d 1085 (5th Cir. 1976), cert. denied, 429 U.S. 1096 (1977).

In Columbia Pictures, 189 F. Supp at 181-82, Screen Gems, Inc., a wholly owned subsidiary of Columbia, was granted the exclusive right to distribute for fourteen years approximately 600 feature films owned by Universal Pictures Company, Inc. The court held that such an agreement constituted an acquisition in light of Section 7:

1 As used here, the words ‘acquire’ and ‘assets’ are not terms of art or technical legal
2 language. In the context of this statute, they are generic, imprecise terms encompassing a
3 broad spectrum of transactions whereby the acquiring person may accomplish the acquisition
by means of purchase, assignment, lease, license or otherwise . . .

4 Id. at 182.

5 Courts have held that there may be an “acquisition” within the scope of Section 7 in cases of a lease
6 or license. See United States v. Archer-Daniels Midland Co., 584 F. Supp. 1134 (S.D. Iowa 1984)
7 (operating lease); Columbia Pictures, 189 F. Supp. 153 (long term exclusive license). In fact, one court has
8 held that the obtaining of a local delivery route in the apparent absence of consideration was an “acquisition”
9 under Section 7. United States v. ITT-Continental Baking Co., 485 F.2d 16, 20 (10th Cir. 1973), rev’d on
10 other grounds, 420 U.S. 223 (1975).

11 Plaintiff argues that Section 9.1 of the Agreement offers an independent basis for finding an
12 “acquisition.” Section 9.1 provides that:

13 As between the Parties: (a) Amazon.com reserves all right, title and interest in and to the
14 Amazon.com Site, the Mirror Site (excluding all Borders.com Intellectual Property), and the
15 Amazon.com Intellectual Property, together with all Intellectual Property Rights associated
16 therewith and no title or ownership of any of the forgoing is transferred, or, except as
expressly set forth in Section 9.2, licensed to Borders.com, or any other Person pursuant to
this Agreement.

17 Ex. A to Kolbe Decl. At p.14, § 9.1 (emphasis added).

18 Plaintiff asserts that Section 9.1 reallocates ownership of the Borders.com website from Borders to
19 Amazon.com. In Columbia Pictures, 189 F. Supp. at 183, the court stated that “asset” should be construed
20 to mean anything of value. In the case at bar, there is no question that www.borders.com has value. As
21 compensation for the arrangement, Borders obtains a percentage of the transaction revenues generated from
22 the purchase of products through the site. Id. § 7.2. Accordingly, the website is an “asset” pursuant to the
Clayton Act.

23 Defendants contend that the no acquisition has taken place and that the Agreement is merely a
24 straightforward contract in which Amazon agrees to independently design, host, operate and maintain a new
25 website accessible through the www.borders.com URL. The court need not determine this issue as plaintiff
26 cannot in any event demonstrate the necessary anticompetitive effect.

27 B. The Issue of Anticompetitive Effect
28

1 Assuming *arguendo* that the Agreement constituted a merger or acquisition, defendant claims that the
2 Agreement poses no violation of Section 7 because plaintiff cannot prove that the Agreement may
3 “substantially . . . lessen competition, or . . . tend to create a monopoly.” 15 U.S.C. § 18. Plaintiff argues that
4 the standard for showing an anticompetitive effect is quite minimal. “Section 7 is an incipency statute that
5 prohibits transactions even before any anticompetitive harm occurs.” Pl. Mot. At 18:12-15. Still, plaintiff
6 must show that the “merger create[s] an appreciable danger of [anticompetitive] consequences in the future.
7 A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable is called for.”
8 California v. Sutter Health Sys., 130 F.Supp.2d 1109, 1118 (N.D. Cal. 2001), quoting Hospital Corp. of
9 America v. Federal Trade Comm’n, 807 F.2d 1381, 1389 (7th Cir. 1986). Evidence of a “mere possibility”
10 of prohibited restraint or tendency toward monopoly is insufficient. FTC v. Consolidated Foods Corp., 380
11 U.S. 592, 598 (1965).

12 In order to determine whether there is anticompetitive activity as a threshold matter plaintiff must
13 define the relevant market. The parties do not agree on the relevant market. Plaintiff urges that the market is
14 online sales, defendants look to industry-wide sales. While defendants argue for a wider market definition
15 they assert that even applying plaintiff’s proposed definition of online book sales, Borders.com represented a
16 *de minimis* share of the market, about 1% of all book sales through online sales channels. See Kessel Decl.
17 at ¶ 14. As a matter of law, “foreclosure of a *de minimis* share of the market will not tend ‘substantially to
18 lessen competition.’” Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962).

19 Plaintiff counters that the defendants have only given gross total estimates as part of the declaration of
20 Steven Kessel and thus the court cannot rule on this issue as part of a motion for summary judgment since it
21 asserts defendants’ sales figures are based on “inadmissible hearsay.” Pl. Opp. at 17:13-19, citing Fed. R.
22 Civ. P. 56(e)(summary judgment affidavit cannot recite hearsay”). Plaintiff, correctly anticipating that on reply
23 defendants would bolster their evidence argues that plaintiff is entitled to cross-examine defendants on their
24 evidence and to take discovery on this point. Plaintiff therefore requests a continuance under Rule 56(f). See
25 Katriel Decl. at ¶ 3. While the court suspects that ultimately discovery will in fact show that Border’s share
26 of the market was *de minimis*, it concurs with plaintiff that summary judgment is not appropriately granted
27 based on unsubstantiated “estimates,” especially at this early stage of the proceedings. Thus the court grants
28

1 plaintiff's request for a continuance on this claim so that the parties may engage in discovery. The court will
2 forbear ruling on defendants' motion for summary judgment at this point.

3 The court is not persuaded, however that plaintiff has adduced any more reliable evidence on this
4 claim in its motion for judgment on the pleadings. Plaintiff asserts that he may show "merely that the size of
5 the entities involved 'makes them suspect in light of Congress' design to prevent undue [economic]
6 concentration.'" Pl. Mot. For Judgment on the Pleadings at 19:1-7, quoting Domed Stadium Hotel, Inc. v.
7 Holiday Inns, Inc., 732 F.2d 480, 492 (5th Cir. 1984). The "evidence" plaintiff relies on to demonstrate that
8 the Agreement is suspect is Amazon.com's public statement that it is the "Earth's Biggest Bookstore" and
9 "the leading online retailer of books" and that Borders is the largest operator of mall-based bookstores.
10 Leaving aside for the moment the fact that plaintiff is switching relevant market definitions mid-stream (online
11 books vs. all books sales), these alleged admissions in no way constitute evidence on which this court would
12 grant a motion for judgment on the pleadings.

13 Moreover, plaintiff's claim that Borders.com was becoming a force to be reckoned with based on its
14 revenue growth rate insults the court's intelligence. Firstly the revenue growth rate **declined** dramatically
15 from 289 percent in 1999 to 53.1 percent in 2000, at the same time that Borders.com's losses increased.
16 Since Borders.com sold such a small relative number of books online, a large internal percentage increase
17 does not correlate with a large increase in market share for online book sales.

18
19 IV. Liability under State Law Claims

20 Liability on the state law claims is derivative of the federal antitrust claims. Plaintiff alleges that
21 defendants were unjustly enriched at the expense of plaintiff and members of the class who made purchases
22 from defendants during the class period by entering into the Agreement and by engaging in anti-competitive
23 practices. FAC ¶ 90. Plaintiff further contends that given such unlawful conduct, plaintiff is entitled to the
24 disgorgement by defendants of their ill-gotten gains. FAC ¶¶ 92-93.

25 Defendants argue that there is no state law liability because there is no federal liability. Although the court has
26 not made a final determination on the federal law claims, an independent basis exists for dismissing the unjust
27 enrichment claim.

1 Plaintiff cannot assert an express contract between him and one of the defendants in order to establish
2 standing, while also bringing a claim for unjust enrichment. A plaintiff may recover for unjust enrichment only
3 where there is no contractual relationship between the parties.

4 Under California law, unjust enrichment is an action in quasi-contract. Paracor Fin. v. Gen. Elec.
5 Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996). An action based on quasi-contract cannot lie where a
6 valid express contract covering the same subject matter exists between the parties. Id. (citing Wal-Noon
7 Corp. v. Hill, 45 Cal. App. 3d 605, 613 (1975); see also Lance Camper Mfg. Corp. V. Republic Indem.
8 Co., 44 Cal. App. 4th 194, 203 (1996).

9 Plaintiff's unjust enrichment claim expressly incorporates by reference the allegation that plaintiff
10 "purchased books directly from at least one of the [d]efendants." FAC ¶ 10. Plaintiff is claiming restitution
11 for overpayments made by himself and class members in their purchases of books from Amazon or Borders,
12 which resulted from defendants' alleged unlawful practices. These damages result from the direct purchase
13 which, under the California Commercial Code, creates an express contract between the buyer and seller.
14 See Cal. Com. Code §§ 2106(1) & 2204(1). Accordingly, a valid express contract covering the same
15 subject matter exists between the parties, and therefore an action in quasi-contract is inappropriate.

16 It should be noted that plaintiff contends that he should nevertheless be permitted to plead unjust
17 enrichment in the alternative. Such an alternative claim might be stated if in count eight plaintiff alleged that no
18 express agreement existed between plaintiff and either defendant. Instead, plaintiff has pleaded the opposite
19 and relies on that contract as the basis for standing in the case at bar. See FAC ¶ 10. Even though Rule
20 8(e)(2) of the Federal Rules of Civil Procedure allows a party to state multiple, even inconsistent claims, it
21 does not alter a substantive right between the parties and accordingly does not allow a plaintiff invoking state
22 law to an unjust enrichment claim while also alleging an express contract. See, e.g., New Paradigm Software
23 Corp. v. New Era Networks, Inc., 107 F. Supp. 2d 325, 329 (S.D.N.Y. 2000); Allied Vision Group, Inc. v.
24 RLI Professional Techs., Inc., 916 F. Supp. 778, 782 (N.D. Ill. 1996); Klutsy v. Taco Bell Corp., 909 F.
25 Supp. 516, 521 (S.D. Ohio 1995). As a result, plaintiff cannot assert his unjust enrichment claim in the
26 alternative.

1 Because plaintiff cannot allege in good faith, while maintaining his other claims, that no contract exists
2 between himself and either Amazon or Borders, this court dismisses plaintiff's unjust enrichment claim without
3 leave to amend. See, e.g., Samuels v. Old Kent Bank, 1997 WL 458434, at *15 (N.D. Ill. Aug. 1, 1997).

4
5 CONCLUSION

6 As set out in detail above, the court finds that § 4.3 does not constitute *per se* price-fixing. The court
7 further finds that § 4.3 is an ancillary provision, however, currently the record is not sufficiently developed for
8 the court to determine whether the Agreement has an anti-competitive effect. Nor does the court have
9 sufficient evidence before it to rule on defendants' motion for summary judgment on the issue of whether the
10 Agreement constitutes an impermissible horizontal market allocation.

11 Plaintiff's motion for judgment on the pleadings on claims of an alleged conspiracy to monopolize the
12 market is DENIED as plaintiff has not, at this stage of the proceedings, proven intent.
13 The court also DENIES plaintiff's motion for judgment on the pleadings on the alleged Clayton Act violations,
14 as plaintiff has not demonstrated on the record before the court sufficient anti-competitive effect. The court
15 also DISMISSES Plaintiff's state law unjust enrichment claim.

16
17 The issue of whether plaintiff has standing by reason of having suffered sufficient antitrust injury is not
18 clear from the record. Therefore the parties are requested to address this issue. Plaintiff shall file within
19 twenty-one (21) days of the date of this order a brief not to exceed 15 pages addressing the issue of antitrust
20 injury. Twenty-one (21) days thereafter defendants shall respond also in a brief not to exceed 15 pages.
21 There will be no reply briefs. The court will then set a further hearing on this matter.

22 Depending upon the court's resolution of the antitrust injury issue or if after the hearing the court is still
23 not able to determine this issue conclusively, the court may ask the parties to conduct a damage study.

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25
26
27 IT IS SO ORDERED.
28

1 Date: March 23, 2004

/s/

MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

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ENDNOTES

1. Unless otherwise noted, facts are taken from the First Amended Complaint.
2. Unless otherwise specified Declarations referred to in the background section will be those filed in support of the Defendant's Motion for Summary Judgment.
3. Plaintiff alleges that Amazon.com's "main competition came from, inter alia, its rival Borders, which operated the competing website www.borders.com. FAC at ¶ 23 ("Prior to the commencement of the Class Period, Amazon's main competition **in the online sales of books** within the United States were www.borders.com . . . and www.barnesandnoble.com.) (emphasis added) The clear impression which plaintiff seeks to make is that Borders.com was a direct threat to Amazon.com. Both Borders and Amazon.com denied this allegation in their answers to the First Amended Complaint. See Border's Answer filed April 23, 2003, ¶ 23; Amazon's Answer filed April 23, 2003, ¶ 23. For purposes of a motion for judgment on the pleadings, defendants' denials are assumed to be true. See *FDIC v. Hudson*, 800 F.Supp. 867, 869 (N.D. Cal. 1990)
4. Borders was taken to task by its shareholders in a December 2000 SEC filing for its failure to have a clear web strategy.
5. Defendant Borders Online Inc. is also a subsidiary of Borders Group, Inc. and is the assignee of the agreement that was entered into with Amazon.
6. This court is therefore cautioned by the Supreme Court's admonishment that "the *per se* rule is not [to be] employed until after considerable experience with the type of challenged restraint." Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 20 n.33 (1979)("BMI"). Plaintiff's citation to Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1412 (9th Cir. 1991) further supports the notion that a court must proceed cautiously before creating new categories for application of the *per se* rule. Like in Bhan, the court suspects that plaintiffs here seek application of the *per se* rule "because it greatly simplifies the proof required." Id. at 1410.
7. Plaintiff additionally asserts that the restriction is enforceable "by both parties." Id. at 5:2. The court finds however, that the restriction runs only to Amazon – it requires nothing of Borders.
8. The Supreme Court also rejected the physicians' arguments that the agreement was pro-competitive, that the Court had insufficient experience with healthcare industry to make a *per se* determination
9. Amazon.com has not provided the court with the actual study results.